

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

HEALTHLINK HOLDINGS AT BEAR CREEK, LLC,
d/b/a RIVERSIDE TRACE HEALTHCARE &
REHABILITATION CENTER

Employer

and

MINNESOTA'S HEALTH CARE UNION, SERVICE
EMPLOYEES INTERNATIONAL UNION LOCAL 113

Petitioner

Case 18-RC-17111

DECISION AND DIRECTION OF ELECTION

Petitioner seeks a unit of service and maintenance employees and licensed practical nurses employed by the Employer at its Rochester, Minnesota facility. The Employer does not contest the appropriateness of the unit, except to contend that all of its LPNs are supervisors within the meaning of the Act. In addition, contrary to Petitioner, the Employer contends that the cooks and the laundry supervisor should be excluded from the unit, because they too are supervisors as defined by the Act.

I conclude that the Employer has failed to meet its burden of establishing that any of the disputed classifications are supervisors within the meaning of Section 2(11) of the Act. Therefore, I will include in the unit the LPNs, the cooks and the laundry supervisor.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. In order to understand my conclusions as set forth above, I will first summarize the Employer's Rochester, Minnesota operations. I will then delineate the Employer's supervisory hierarchy, focusing on those individuals that Petitioner and the Employer stipulate are supervisors within the meaning of the Act. The third section of this decision will describe the operation of the nursing department, as well as the jobs of the LPNs, who are employed in the nursing department. I will next describe the jobs of the cooks, as well as other employees employed in the dietary department. Because the status of the laundry supervisor is also in dispute, I will also describe the operation of the laundry area, including the jobs performed by laundry assistants and the laundry supervisor. Finally, I will review Board cases regarding supervisory status, and explain my conclusion that the LPNs, cooks and laundry supervisor are not supervisors within the meaning of the Act.

¹ The Employer, Healthlink Holdings at Bear Creek, LLC d/b/a, Riverside Trace Healthcare & Rehabilitation Center, is a Minnesota limited liability company with a facility located in Rochester, Minnesota, where it is engaged in the operation of a nursing home. During the past calendar year, a representative period, the Employer received gross revenue in excess of \$100,000 and the Employer purchased goods and services valued in excess of \$5,000 directly from points located outside the State of Minnesota.

The Employer's Operation

The Employer's facility that is the subject of this petition is a nursing home. All beds are designated for skilled nursing. The facility is Medicare and Medicaid certified. According to the Employer, its residents include a large number of short stays of less than 30 days duration, where the focus of the care is therapy following surgery. There are a total of 140 beds. Census at the time of the hearing was about 112 residents.

The building housing the Employer's operation consists of four floors. The basement level includes the laundry, physical therapy, maintenance office, staff lounge, a classroom, and storage area. The first floor consists of administrative offices, the dining room, kitchen, reception area and one hospice room (available for a resident who is dying, as well as the resident's family members). The first floor also has 20 resident beds, referred to as the first floor wing. The second and third floors are similar to each other in that each has a central nurse's station and two wings off of the nurse's station. Each wing has 30 beds. The second floor also houses shower rooms, the office of the social worker, another hospice room, and a med room. The employees assigned to the third floor focus more on the care of residents with dementia.

Supervisory Hierarchy

Responsible for the overall operation of the facility is Administrator John Langemo. Reporting to Langemo are the following individuals: Director of Nursing Renae Hazeman; Staff Development Coordinator Harriet Rudd; Dietician Mary Kuester; Director of Environmental Services Jim Ackman; Admissions Director Deb Lansdowie; Director of Social Services Cindy Hazel, Director of Activities Carrie Bottoma; and Office Manager Karen Eaker. Petitioner and

the Employer agree that all of these individuals should be excluded from the unit because they are supervisors within the meaning of the Act.

Department of Nursing

Director of Nursing Hazeman is responsible for operation of the Employer's Department of Nursing. Reporting directly to Hazeman are a ward clerk, who the parties agree is in the unit, and a staffing coordinator and MDS coordinator, who the parties agree should be excluded from the unit. Also reporting to Hazeman are two clinical managers, who the parties agree are supervisors, and therefore excluded from the unit. According to the Employer, the floor nurses (who are LPNs and RNs) report to the clinical managers, and in turn, the nurses aides (including those certified to give some medications) report to the floor nurses. It is the supervisory status of the floor nurses who are LPNs that is one of the disputes in this matter.

The Director of Nursing works from about 9:00 a.m. to about 5:30 p.m. weekdays. During the day shift, which for floor nurses is from 6:00 a.m. to 2:30 p.m., staffing in the nursing department is as follows: 1st floor – one floor nurse and two nurses aides; 2nd floor – clinical manager, one floor nurse for each of two wings and three nurses aides for each wing (unless the census is low, then each wing has two aides); 3rd floor – clinical manager, one floor nurse for each of two wings and three nurses aides for each wing. As already noted, Petitioner and the Employer agree that the clinical managers are supervisors. During the evening shift, which for floor nurses is from 2:00 p.m. to 10:30 p.m., staffing in the nursing department is as follows: House Charge Nurse responsible for overall operation; five floor nurses; and one nurses aide for the first floor, six for the second floor and five for the third floor. During the night shift, which for floor nurses is from 10:00 p.m. to 6:30 a.m., staffing in the nursing department is as follows:

House Charge Nurse responsible for the overall operation; three floor nurses; and one nurses aide for the first floor, three for the second floor and two for the third floor. The Employer and Petitioner agree that the House Charge Nurses are supervisors. The Employer's goal is that House Charge Nurses not work on the floor and not be responsible for the care of specific residents. However, at times they might have to work as floor nurses if the facility is understaffed. Finally, while the Employer's description of staffing levels appears to be the ideal, it is clear from the testimony of a LPN that often floors operate with less staff. It is also clear that LPNs work shifts different from the eight-hour shifts described by the Employer. For example, the LPN who testified works 12-hour shifts.

Floor nurses, who may be LPNs or RNs, are not assigned to provide daily cares (such as bathing, dressing, grooming, transporting) to specific residents. Rather, those responsibilities belong to the nurses aides. However, only floor nurses can distribute and administer medications and apply ointments (with some limited exceptions as nurses aides with special certification can administer some – but not all – medications). Floor nurses also assist in transferring residents, perform charting and other documentation regarding each resident's status, and check treatment sheets to make sure doctors' orders are being followed. Floor nurses are involved in certain types of daily cares also. One example would be if the wing the floor nurse were assigned to is short nurses aides. In addition, only LPNs or RNs can perform certain tasks. For example, only nurses can clip the nails of diabetic residents, and only nurses can change colostomy bags. Other duties performed by floor nurses include giving and receiving report, transcribing doctors' orders, and making sure residents get to appointments and that lab tests are drawn. The LPN who testified stated that nearly her entire 12-hour shift is taken up with activities related to the residents or records. LPNs are not provided a job description when they are hired.

The Employer acknowledges that floor nurses do not have any role in the following: hiring, firing, evaluating, processing or resolving grievances, scheduling hours, assigning work, granting time off, orientation of new employees, authorizing overtime, granting raises, or deciding whether to call in replacement employees due to staff shortages. Floor nurses also do not have access to personnel files. They are hourly paid, punch a time clock, receive overtime pay for hours in excess of 40 hours/week, and do not attend weekly management meetings, which are attended by all of the stipulated supervisors. However, the Clinical Manager who is a LPN also punches a time clock.

Floor nurses monitor breaks by nurses aides. The Employer has a policy that no employee in the nursing department may take a break during resident meal times. Otherwise, an aide merely asks the floor nurse whether she can take a break. According to the testimony of a LPN, the nurses aides decide among themselves when to go on breaks, but notify her so that she knows whom is on the floor. There is no evidence on the record that a floor nurse has ever refused to allow a break when requested – but it does appear that floor nurses can grant or deny breaks depending on resident care needs. Finally, floor nurses can allow nurses aides to leave early, if all assignments of a particular aide are completed. However, the floor nurse is supposed to check first with the House Charge Nurse/Clinical Manager to make sure that assistance is not needed elsewhere in the facility.

The main focus by the Employer in support of its position that LPNs are supervisors is its contention that LPNs discipline or effectively recommend the discipline of nurses aides. In the record are a number of corrective action reports filed by floor nurses. All except those involving a LPN named Randy Hopp, are handwritten accounts (some on an Employer form and some on a sheet of paper) where floor nurses describe some sort of inappropriate conduct by nurses aides.

None (other than Hopp) recommends that discipline is issued, and there is no record testimony that discipline was issued. Of the three documents in the record authored by Hopp, all are on forms provided by the Employer. Two of the three are similar to the others – that is a recitation of what occurred with no recommendation for discipline. The third one issued by Hopp includes a check in the blank next to “First Warning,” and the Employer contends that Hopp placed the checkmark in the blank. The Employer no longer employs Hopp, although the record is silent with regard to when he left his employment. Two of the corrective actions issued by Hopp are dated in the summer of 2002, the other is undated.

The testimony of Director of Nursing Hazeman regarding her view of these corrective action reports is somewhat inconsistent. On the one hand, Hazeman refers to them in a conclusionary fashion as “disciplinary”. However, Hazeman also testified, “I don’t really call it a warning,” when describing the one written by Hopp that has a check mark next to the blank “First Warning.” Rather, she states, “You could call it as an opportunity for improvement.” More generally, Hazeman testified that the floor nurses’ jobs are to make sure that nurses aides provide daily cares for residents. If the floor nurses see any deficiencies, they are to follow-up with the nurses aides, and point it out to them. The floor nurses are under no obligation to report the deficiencies assuming the nurses aides comply. If the nurses aides either do not comply or need repeated reminding, then the floor nurses should be writing them up. Hazeman further stated that in writing the nurses aides up, the floor nurses should be using the disciplinary process forms. She also acknowledged that to the extent any nurses aide was disciplined as a result of the corrective action reports in evidence, the discipline was imposed by her, and not the LPNs. However, the record is unclear whether any of the corrective action reports filed by floor nurses resulted in formal discipline or not. Finally, according to Hazeman, “The nurse makes the

judgment. I agree or disagree with their judgment.” In doing so, according to Hazeman, she will generally ask the employee his or her version of what occurred, and if she decides there was not an issue, she would not follow-up by requiring that performance be improved. For example, with regard to the one where LPN Hopp checked the blank next to “First Warning,” Hazeman testified that she brought both Hopp and the nurses aide into her office, spoke to them both about what occurred, and agreed with Hopp that the employee’s performance was deficient. Hazeman then wrote on the form a description of the performance improvement that was required.

During the hearing, Employer counsel took the position that by introducing these corrective action reports, the Employer was not necessarily saying they constituted discipline. Rather, in the Employer’s view, they evidenced that the floor nurses counseled or spoke to the nurses aides about misconduct.

The LPN who testified confirmed that in the event a nurses aide failed to perform assigned duties, the LPN would write up a report. She would then give it to the House Charge Nurse or Floor Clinical Manager (depending on which was working), or in their absence, to Director of Nursing Hazeman. She said that she would describe what took place, and would check the blank next to the words “First Warning,” without knowing whether it was in fact a first warning. She also testified that she would never fill out the bottom section on what performance improvement was required, because that is the job of the House Charge Nurse or Floor Clinical Manager. Finally, the LPN stated that she would not know what happened to the nurses aide after she turned in the form, because her involvement ends. The record is unclear whether this particular LPN has actually ever filled out a corrective action report.

In connection with the corrective action reports, the Employer presented evidence that clearly establishes that floor nurses are held responsible for the care provided residents on the

wings they are assigned to, including the care provided by nurses aides. The LPN who testified confirmed that part of her job is to make sure that nurses aides perform their assignments. She stated that she does so on a “continuing basis” throughout the day, while performing her own tasks related to patient care and record keeping. In addition, there is evidence that Director of Nursing Hazeman has encouraged floor nurses to make more use of corrective action forms when nurses aides are not complying with expectations set out by the Employer (as specified by the Director of Nursing) or by federal and state guidelines. It is clear that in Hazeman’s view, floor nurses are not sufficiently utilizing their authority to write corrective action reports.

Dietary Department

With regard to the kitchen, Dietician Mary Kuester is responsible for the overall operation. Reporting to her is a Director of Dietary Services Christine Rodgers, who the parties agree should be excluded from the unit as a supervisor. Reporting to the Director of Dietary Services are five cooks, four of whom the Employer contends are supervisors. Also employed in the kitchen are 14 dietary aides. Eight of the 14 dietary aides are full-time. The six part-time dietary aides work less than 20 hours each, and would constitute, at most three full-time equivalencies. Thus, according to Rodgers, there are six supervisors (Kuester, Rodgers and four cooks) for dietary aides who equal 11 full-time equivalents.

The kitchen is open from 5:30 a.m. – 8:00 p.m. seven days a week. Kuester works 8:00 a.m. – 4:00 p.m. weekdays. Rodgers works 6:00 a.m.- 2:30 p.m. weekdays. Thus, according to the Employer, for 51 and ½ hours each week, neither Kuester nor Rodgers is present to supervise the kitchen.

Cooks do not schedule hours of work. They also do not discipline, evaluate or orient any employees. There is no evidence that they are involved in hiring, discharge, processing or resolving grievances, adjusting wages, or making any recommendations in any of these areas. Cooks are also not involved in assigning work. Rather, the work is routine, and the jobs do not change day to day. To the extent the work varies, it relates to on which line the dietary aides will work. Rodgers determines that when scheduling their hours. Some jobs like taking carts to the floors are done by whoever is available. Cooks are hourly paid, punch a timeclock and receive overtime pay. However, Rodgers is also hourly paid, punches a timeclock, and receives overtime pay.

The Employer's position that cooks are supervisors appears to rest on two facts. First, the cooks sign off on "timeclock feedback forms" with the title cook/supervisor. This form explains deviations from the normal schedule or okays hours of work when employees have been unable to punch in because they forgot their badges that are necessary to swipe the timeclock. Second, the Employer points out that in the absence of Kuester or Rodgers, the cooks are in charge of making sure things are getting done. It is clear that cooks also cook the meals, and work side by side with dietary aides. Cooks do have the telephone numbers of Kuester and Rodgers, and can contact them with problems. According to a cook who testified, she contacts Kuester or Rodgers even when an employee calls in absent, and either Kuester or Rodgers decide whether and who to call in as a replacement.

When asked what cooks are to do if they confront problems with dietary aides doing their jobs improperly, Rodgers responded that the cooks are to report the problems to her, and that she decides on any discipline that is to be issued. It does not appear that cooks know whether any

problems they report result in discipline, or what form of discipline. Rodgers does not share that information with the cooks, and the cooks do not have access to personnel files.

The Laundry

As Director of Environmental Services, Jim Ackman supervises the operation of the Employer's laundry, housekeeping and maintenance staff. The housekeeping and maintenance employees report directly to Ackman. However, in the laundry is a laundry supervisor, whose status is in dispute.

The laundry supervisor is Dawn Gary. According to both Ackman and Gary, Gary's job is to make sure the laundry is running smoothly. However, both Gary and Ackman also agree that the work in the laundry is routine. Apparently there are no specific job assignments, but instead all employees do all jobs, in whatever order is necessary to get the work done.

Part of Gary's responsibility is to schedule the hours of the laundry employees. She also schedules the hours of the housekeeping employees. At the hearing, Gary explained that Ackman asked her to write out the schedules for both sets of employees. Gary works from 6:00 a.m. to 2:00 p.m. on weekdays. While not entirely clear, it appears that in addition to Gary there are three other full-time and one part-time employee. One other full-time employee works 6:00 a.m. to 2:00 p.m. weekdays. Another works weekdays from 3:00 p.m. to 11:00 p.m. The two remaining employees work weekends, one from 6:30 a.m. to 3:00 p.m., and the other from 9:00 a.m. to 5:30 p.m. What is not clear is whether the laundry employees have set schedules – that is that each employee works the same shifts and days of the week each week – or whether the laundry employees rotate shifts. According to Gary and Ackman, once Gary has completed the

schedule, she gives it to Ackman. While Ackman does not change the schedule, he stated that he has the authority to do so.

Gary does not evaluate laundry employees. There is no evidence that she has ever disciplined a laundry employee. In fact, according to Gary, on the two occasions where there were problems, she went to Ackman and told him about the problems. In both situations Ackman told Gary to write down her observations and/or what was said, and then Ackman acted. In one situation he sent the employee home, and then called her back in for a urine test. In the other he called both Gary and the employee into his office and reviewed what occurred and then told the employee what was expected of her. There is also no evidence that Gary has the authority to terminate employees, or effectively recommend their terminations. She does not appear to have any role in considering or adjusting grievances, in establishing wage rates of employees or in authorizing overtime. According to Ackman, it is Gary's responsibility to authorize vacation requests. According to Gary, the laundry employee merely completes a PTO slip requesting time off, Gary gives the slip to Ackman, and then Gary schedules employees taking into account the time off.

The evidence most in contention is Gary's role in hiring employees. Ackman testified that Gary essentially hired on her own three employees – Jennifer Hage, Teana Milliken, and My Chau. He also testified that he never participated in interviewing any of the three, that Gary recommended their hires, and he agreed with her. Ackman acknowledged that he has the authority to not follow any of Gary's recommendations, but that he did not do so in any of these cases.

Gary's testimony differs somewhat. She stated that with regard to all three, she went to Ackman and asked whether the laundry could hire an employee. In all three cases, according to

Gary, an employee had either left employment or was on an extended leave, and therefore, Gary wanted to know if a replacement could be hired to fill the hours the departed employee had worked. In all three situations Ackman agreed that a replacement could be hired, but in one situation, it was only after checking the hours of the laundry. In that situation, Ackman told Gary she could hire a part-time person. With regard to Hage, according to Gary, Ackman told Gary about the fact that there was an application from Hage. Gary looked at it, and said she looked qualified. Ackman responded that as long as Hage could do the job, Gary should go ahead and hire Hage. According to Gary, Hage was the only applicant considered. It is not clear whether Hage was interviewed. With regard to Milliken, according to Gary, Ackman told Gary that she had to post the position internally for two weeks so that current employees could apply. Milliken responded to the posting by telling Gary that she was interested. Gary told Milliken to fill out an application and talk to Ackman. Subsequently, Ackman told Gary he hated to lose Milliken as a housekeeper, but he could not hold her back. Milliken was then hired for the laundry. Finally, with regard to Chau, Gary found out from Christine Rodgers that there was an application on file for a dietary position, and Rodgers told Gary she could look at it. Gary took the application to Ackman, and said to him that Chau was probably a good person because she had cousins working in the kitchen. Ackman told Gary to talk to Chau. Gary did talk to Chau – but only to tell her the hours of work. A decision was then made to hire Chau, subject to a criminal background check. As the background check was proceeding, the Employer discovered some problems with Chau's green card, and the office manager delayed Chau's employment. However, as those problems were nearing resolution, Ackman told Gary that due to a cutback in hours, Chau could not be hired.

Conclusion

The Board's Analytical Framework

The party alleging that an individual is a supervisor has the burden of proof. NLRB v. Kentucky River Community Care, 121 S.Ct. 1861, 1866-1867 (2001). In order to prove supervisory status, the party alleging it must prove that the individual “possess(es) one or more of the indicia set forth in Section 2(11) of the Act and exercise(s) that authority in a manner which is not merely routine or clerical in nature.” Williamette Industries, Inc., 336 NLRB No. 59, slip. op., p. 1. Any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn 8 (1999). Only individuals with “genuine management prerogatives” should be construed supervisors, as opposed to “straw bosses, leadmen . . . and other minor supervisory employees.” Chicago Metallic Corp., 273 NLRB 1677, 1688 (1985), *enfd.* in relevant part 794 F.2d 527 (9th Cir. 1986). Thus, an individual who exercises some “supervisory authority” only in routine, clerical or perfunctory manner will not be found to be a supervisor. Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986). “The Board must judge whether the record proves that an alleged supervisor’s role was other than routine communication of instructions between management and employees without the exercise of any significant discretion.” Quadrex Environmental Co., 308 NLRB 101, 102 (1992). See also Azusa Ranch Market, 321 NLRB 811 (1996).

With regard to all three classifications in dispute, the Employer has not met its burden of proof. The record is very clear that the LPNs, cooks, and laundry supervisor do not exercise discretion in any of the functions that the Employer argues establishes supervisory status.

LPNs

As noted above, the main focus of the Employer's argument is that LPNs either discipline or effectively recommend the discipline of nurses aides. However, even the Employer is not clear on whether corrective action reports are discipline or not. The Director of Nursing testified at one point that they are opportunities for improvement. In any event, the record is clear from both the testimony of a LPN and the testimony of the Director of Nursing that the corrective action reports serve only as a reporting function to the Clinical Managers, House Charge Nurses and/or Director of Nursing. Moreover, the Director of Nursing also made clear that she conducts her own investigation of any incidents reported by the LPNs, and that she decides what (if any) action is warranted. Finally, not only is there not clear record evidence that the corrective action reports are considered discipline, but also there is no evidence that they are usually accompanied with recommendations for future discipline. Moreover, to the extent some (but not all) LPNs sign the corrective action reports on the line that states "Supervisor's Name," that fact is not enough to establish supervisory authority. Williamette Industries, Inc., 336 NLRB No. 59 (2001) (where warnings simply bring to the employer's attention substandard performance without recommendations for future discipline, warnings constitute reporting function); Waverly-Cedar Falls Health Care, 297 NLRB 390 (1989), *enfd.* 933 F.2d 626 (8th Cir. 1991) (participation of director of nursing indicates that the warnings do not automatically lead to discipline or adverse action against employee); Necedah Screw Machine Products, 323 NLRB 574, 577 (1997) (fact that individual sign document above title "production supervisor" does not establish supervisory status). To the extent that the Employer is merely arguing that the corrective action reports suggest that LPNs monitor the work of nurses aides, there is no question that the evidence supports a conclusion that part of the responsibility of LPNs is to make sure nurses aides perform

all of their assignments, and to instruct them to complete any work not done. However, such evidence is insufficient to establish supervisory status. Merely directing employees to carry out assignments made by the Director of Nursing or care plans established by the Employer or the doctors of residents, does not require the use of independent judgment as set out in Section 2(11). Franklin Home Health Agency, 337 NLRB No. 132 (2002).

Medcare Associates, Inc., 330 NLRB 935 (2000), cited by the Employer,² does not require a contrary conclusion. In that case the Board relied on the fact that the nurse managers in dispute issued oral and written warnings, and effectively recommended suspensions, and uncontradicted testimony that there was no independent review of these actions. The Employer's Director of Nursing was very clear that she independently reviews the circumstances of each corrective action report, and seemed to suggest that she did not view corrective action reports as a form of discipline.

I also conclude that the facts that LPNs monitor the breaks of nurses aides and may allow them to leave early does not establish supervisory status. It is clear from the record that LPNs are supposed to check with their Clinical Managers or House Charge Nurse before allowing nurses aides to leave early. Such limited authority is routine and does not require the use of independent judgment. Washington Nursing Home, 321 NLRB 366 (1996); Ten Broeck Commons, 320 NLRB 806 (1996).

Cooks

The record fails to establish that the cooks are supervisors. The fact that the cooks sign off on "timeclock feedback forms" is nothing more than a clerical function, in that the cooks are merely affirming the fact that dietary aides were working as set forth on the timecard. The fact

² The case is cited by the Employer as Westwood Health Care Center.

that cooks are responsible for making sure dietary aides complete work in the kitchen, without more, is also insufficient to establish supervisory status, particularly as cooks do not schedule the hours of or assign the work to the dietary aides. Franklin Home Health Agency, supra.

Moreover, it is clear that like the LPNs, cooks merely report problems to their supervisor. It appears that, unlike the LPNs, they do so verbally and do not even fill out corrective action reports. While the record is clear that the Dietician and Director of Dietary Services are not at the Employer's facility during all hours the kitchen operates, a cook testified that she telephones one or the other with any problems. In any event, the record is insufficient to establish that the cooks exercise any greater independence when the Dietician or Director of Dietary Services are not present as compared to when they are present. Beverly Enterprises v. NLRB, 148 F. 3d 1042, 1048 (8th Cir. 1998).

Laundry Supervisor

There is no dispute that the laundry supervisor is to make sure the laundry is running smoothly. There also is no question that she creates a schedule of employees' work hours, not only for the laundry but also for housekeeping. However, making schedules does not prove supervisory status. The Employer bears the burden of proving that the laundry supervisor's scheduling decisions require the use of independent judgment, and are not simply routine. From this record I cannot even determine whether laundry employees rotate shifts, or whether they work the same shifts and days of the week every week. At the hearing the Employer made the point that the laundry supervisor schedules around employee vacations. However, it does not appear that the laundry supervisor approves or denies vacations – instead her role appears to be to determine how shifts will be filled for the absent employee.

The key issue is whether the laundry supervisor either hires or effectively recommends the hiring of employees who work in the laundry. I conclude that the record does not support a conclusion that she possesses either the authority to hire or effectively recommends the hiring of applicants.

It appears to be true, as Director of Environmental Service Ackman testified, that he did not interview any of the last three candidates hired, or in the case of Chau, selected for hire. However, as it turns out, there is no evidence that the laundry supervisor interviewed any of the candidates either. Rather, in all three situations the laundry supervisor was given the application of one applicant and told that the person might be a good candidate. In not one situation did the laundry supervisor have for consideration multiple candidates. It appears to be the case that in all three situations the laundry supervisor agreed that the candidate suggested looked like a promising prospect. However, agreeing with the suggestions of Ackman or Rodgers is far different than selecting from a roster of potential employees. I also note that the laundry supervisor's testimony was clear that it was Ackman's decision whether anyone would be hired, and in at least the first situation he analyzed the hours of work available before authorizing that someone be hired.

I conclude that the laundry supervisor's authority in this case is little different (and in fact may be less) than that of an employee found not a supervisor by the Board in Hogan Mfg., 305 NLRB 806 (1991). In Hogan, the employee in dispute administered welder-qualifying tests to applicants and to employees seeking reclassification. The employee then advised the employer whether the individuals tested should be denied employment or reclassification based on the results of the test. In concluding that the employee in dispute was not a supervisor, the Board emphasized that the employee merely administered a test and reported the results – and that there

was no evidence the employee exercised independent judgment in doing so. 305 NLRB 807.

While the laundry supervisor is not administering an objective test, it appears that she is doing nothing more than reviewing applications suggested by supervisors above her, to make sure that based on a review of the application the applicant appears qualified. I also note that like in Hogan, there is not other basis for concluding that the laundry supervisor exercises 2(11) authority. For example, the laundry supervisor does not discipline or assign work.

In its post-hearing brief, the Employer cites a number of cases in support of its position that the laundry supervisor effectively recommends the hiring of applicants for employment. In reviewing those cases, it is clear that in all of them the individual in dispute interviewed and selected among several applicants. While not all of the cases were specific in terms of the numbers of applicants involved, none involved the review of a single application for each opening. For example, in RB Associates, 324 NLRB 874, 879 (1997), the individual found to be a supervisor was told to select the three most qualified from 20 applications.

6. Because the Employer and Petitioner agree, assuming LPNs are not supervisors, that they should be included in the service and maintenance employees unit, I will order an election in a unit including all three groups of employees. Therefore, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses, and service and maintenance employees employed by the Employer at its Rochester, Minnesota facility; excluding registered nurses, office clerical employees, guards and supervisors as defined in the Act, as amended, and all other employees.

DIRECTION OF ELECTION³

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁴

³ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **March 25, 2003**.

⁴ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Minnesota's Health Care Union, Service Employees International Union Local 113.

Signed at Minneapolis, Minnesota, this 11th day of March 2003.

Marlin O. Osthus, Acting Regional Director
National Labor Relations Board
Eighteenth Region
330 Second Avenue South
Minneapolis, MN 55402

Index #177-8520-0100
177-8520-0800
177-8560-1500
177-8560-8000
177-8580-8050

790, Towle Building, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before close of business **March 18, 2003**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.